Supreme Court, U.S.
FILED

982057 JUN 23 1999

OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

ALLAN NORTON, a minor; and
BRUCE AND SUSAN NORTON, his parents,

Petitioners,

v.

ORINDA UNION SCHOOL DISTRICT,

Respondent.

Petition for a Writ of Certiorari
To the U.S. Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Bruce Norton, pro se
4 Ichabod Lane
Orinda, CA 94563
(925) 254-9009

31 pp

QUESTIONS PRESENTED FOR REVIEW

1. The central question presented to this Court is when should a child with a disability be entitled to protection under the Individuals with Disabilities Education Act (IDEA)?

2. Is determining that a child with a disability in California is not qualified for protection under the IDEA as long as the child is "performing adequately" within the regular education classroom with modifications that have not been provided under an individualized education plan (IEP) complying with the intent of the IDEA?

3. If a child is not entitled to special education because he is "performing adequately" within the regular education classroom with informal modifications, then do those modifications delay early identification and the need for special education services in contravention of the intent of the IDEA?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit.

TABLE OF CONTENTS

Questions Presented for Review

List of Parties to the Proceedings In the Court Below. i

Table of Contents ii

Table of Authorities. iv

Opinions Below. 1

Statement of Jurisdiction 2

Constitutional Provisions, Treaties Statutes, Rules and Regulations Involved. 2

Statement of Case 3

Reasons for Granting Writ 23

Conclusion. 24

Appendix:

A. Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit

B. Order Denying Plaintiff-Appellant's Petition for Rehearing

C. Excerpts from Appellee's Answering Brief in the U.S. Court of Appeals For the Ninth Circuit

D. Letter from Bridget A. Flanagan, Esq., of the law firm of Miller, Brown & Dannis, the attorneys for The Orinda Union School District, Requesting Publication of the Memorandum Opinion of the U.S. Court Of the Appeals for the Ninth Circuit

E. Findings of Fact and Conclusions Of Law of the U.S. District Court for the Northern District

F. Decision of the California Special Education Hearing Office

G. Cal. Educ. Code §§ 56026 And 56337.

H. Summary of Diagnosis and Services Recommended by Professionals

TABLE OF AUTHORITIES

CASES

Cedar Rapids Community School District v. Garret F.
____ U.S. ____, No. 96-1793, Decided
March 3, 1999 22

Pauley v. BethEnergy Mines, Inc.
501 U.S. 680, 111 S.Ct. 2524, 115 L.Ed.2d
604 (1991) 10

Rowley v. Board of Education at the Hendrick
Hudson Central School District
102 S.Ct. 3034, 458 U.S. 176, 73 L.Ed.2d
690 (1982) 19, 20, 21

STATUTES

Federal

20 U.S.C. §§ 1400-1485 2

20 U.S.C. § 1401(a)(20) 6

20 U.S.C. § 1412(5)(B) 19

20 U.S.C. § 1414(a)(1)(A) 5, 6, 8

28 U.S.C. § 1245(1) 2

28 U.S.C. § 1291 ..... 2, 3

34 C.F.R. § 300.220 ..... 5, 6, 8

34 C.F.R. § 300.340-350 6

34 C.F.R. § 300.356 19

34 C.F.R. § 300.543 12

34 C.F.R. § 300.550 19

State

Cal. Educ. Code § 56026 ..... 4, 7, 12, 13, 17

Cal. Educ. Code § 56337 ..... 4, 7, 11, 12, 13

Other Authorities

Office of Special Education, U.S. Dept. of Education

Letter to Stephen Mark Ulissi
18 IDELR 683, Dated January 14, 1992 8

Letter to Patricia M. Lillie
23 IDELR 714, Dated May 10, 1994 ..... 8, 9

Letter to Juanita S. Pawlich
24 IDELR 959, March 6, 1996 ..... 9, 10

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1999

ALLAN NORTON, a minor; and
BRUCE AND SUSAN NORTON, his parents,

Petitioners,

v.

ORINDA UNION SCHOOL DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Allan Norton, and Bruce and Susan Norton, his Parents, the Petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on February 25, 1999, and the Petition for Rehearing which was denied on March 25, 1999.

OPINIONS BELOW

The February 25, 1999, memorandum opinion of the U.S. Court of Appeals for the Ninth Circuit, whose judgment is herein sought to be reviewed is Case No. 97-17029 and is not

published, and is reprinted in the separate Appendix to this Petition, pp. A-1 through A-14. The Petitioner filed a Petition for Rehearing that was denied by the U.S. Court of Appeals for the Ninth Circuit on March 25, 1999, Appendix, p. B-1. The prior opinion of the United States District Court for the Northern District of California, was entered September 18, 1997, and is No. CV-95-02808-SBA, Appendix, pp. E-1 through E-48. The California Special Education Hearing Officer's decision was issued on May 19, 1995, Case No. SN 681-94, Appendix, pp. F-1 through F-49.

STATEMENT OF JURISDICTION

The Petition for Rehearing was denied by the U.S. Court of Appeals for the Ninth Circuit on March 25, 1999. The judgment of the Ninth Circuit Court of Appeals was entered on February 25, 1999. The Ninth Circuit of Appeals had jurisdiction over this case pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1245(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

This is an action under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§1400-1485, and is brought by Petitioners in order to enforce the

right of Petitioner Allan Norton and other children similarly situated in California to a free appropriate public education pursuant to the IDEA.

STATEMENT OF CASE

The Ninth Circuit Court of Appeals had jurisdiction over this case under 28 U.S.C. § 1291 as this was an appeal from a final judgment in the U.S. District Court for the Northern District of California. The Ninth Circuit Court of Appeals has determined that a child with disabilities who is "performing adequately" within the regular education classroom with informal modifications is not entitled to protection under the IDEA. The Orinda Union School District (OUSD) understood how novel this finding was in its letter to the Ninth Circuit Court of Appeals requesting that the decision be published:

> The Court held that a gifted student who was diagnosed with attention deficit disorder and a learning disability but was earning average grades was ineligible for IDEA protection because he was making satisfactory progress with modifications to his regular education program.
>
> * * * *
>
> [T]he Ninth Circuit Court of Appeals sets forth a practical threshold for special education of gifted children, stating, 'IDEA protection is available in California only where modifications to the student's regular educational program are

> ineffective.' Further, it found, based upon that premise, that '[n]either the Hearing Officer nor the district Court erred in holding that Allan received an appropriate public education in the school district's regular education program in 1994 and was ineligible for IDEA protection at that time.' This precedential language critically assists school districts in interpretation of the IDEA. Appendix, pp. D-5 through D-6. (emphasis added)

The Nortons were not asking for an IEP because their child was gifted, but because of his unique needs as a result of also being learning disabled. While it appears that the above language is indeed precedential, it is particularly novel since it was the State Special Education Hearing Officer's (Hearing Officer's) decision to use this language as a conclusion of law when there was no cited federal statutory or case law to support it.

A school district shouldn't be able to say that it has met its burden under the IDEA by merely providing informal modifications, which keep the child "performing adequately". Even under California law, modifications have a specific purpose. Cal. Educ. Code 56026(b) and 56337. Modifications are to be designed to address an impairment and correct a severe discrepancy. Any modifications that the school offered to Allan were never designed to address an impairment or correct a severe discrepancy during the time period material hereto as the OUSD had not identified an impairment or severe discrepancy

and continually denied there was any adverse effect on Allan's educational performance.

The IDEA stands for the proposition that all children, regardless of the severity of their disability, who are in need of special education and related services, are identified, located, and evaluated. See 34 C.F.R. §300.220; 20 U.S.C. 1414(a)(1)(A). The purpose of the IDEA is

> (a) To ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs;
>
> (b) To ensure that the rights of children with disabilities and their parents are protected;
>
> (c) To assist States and localities to provide for the education of all children with disabilities; and
>
> (d) To assess and ensure the effectiveness to educate those children. 34 C.F.R. §300.1; 20 U.S.C. 1401 Note. (emphasis added)

The OUSD did not concern itself with whether Allan had a disability, but only whether he was "above grade level in all academic tests" or "within the instructional range" of the regular education classroom. In this case, the OUSD recommended, without identifying any learning disability or impairment, informal modifications to the regular education classroom aimed at keeping Allan "performing adequately" at

grade level, or "within the instructional range"[1] of the regular education classroom. Under the school's implementation, the modifications are not offered under any formal plan or under any federal law, and the OUSD has not identified a disabling or handicapping condition. Consequently, under this system, the child and his parents have no legal rights and protection until the student is "inadequately performing." The Ninth Circuit has found that in order for the Petitioners (Nortons or Parents) to have prevailed, Parents needed to show that Allan

> "was not benefitting from his regular education classroom environment, which, for Allan, included the special modifications implemented by the school district at the suggestion of doctors and others who had evaluated Allan." Appendix, p. A-9.

If, as the Ninth Circuit determined, Allan was in fact receiving services as suggested by doctors and others who had evaluated him, those "individualized services" should have been offered

---

[1] Allan was denied IEP eligibility at the first IEP meeting because he was "above grade level in all academic tests" and no impairment or specific learning disability was found by the OUSD. He was then denied IEP eligibility at a second IEP meeting ten months later because he was "within the instructional range of the classroom" even though it did then mention the ADD as diagnosed by Dr. Landman.

through an individualized education plan (IEP) as mandated by the IDEA. 34 C.F.R. § 300.340-350, 20 U.S.C. 1401(a)(20).

The Ninth Circuit has allowed the continuance of the practice by the OUSD of only looking to grade level performance by concluding that a disabled child is not qualified under California law for protection under the IDEA as long as he is "performing adequately" within the regular education classroom with (or without) modifications. The Court has cited California Education Code §§56026(b) and 56337(c) [Appendix, pp. G-1 through G-3] as supporting the OUSD's denial of eligibility for an IEP under the IDEA or other federal legislation. As there is no definition of the term "performing adequately" in the decision, one must assume that the Ninth Circuit has adopted the criteria used by the OUSD to determine need: "grade level performance" or "within the instructional range of the regular education classroom," as these were the reasons set forth in writing by the OUSD in its denials of an IEP under the IDEA. To allow the continued use of this threshold criteria enables the OUSD, without looking at each child on a case by case basis, to delay the identification of any child's learning disability or other disabling condition until such time as the child is performing below grade level or outside of the instructional range of the classroom.

The threshold requirement of grade level performance would seem to contradict the IDEA's statutory requirement of early identification of children with disabilities, also known as the child find duty. 34 C.F.R. § 300.220. 20 U.S.C. 1414(a)(1)(A). Also, the Office of Special Education (OSEP) of the U.S. Department of Education, the federal agency designated to oversee the implementation of the IDEA, has given relevant guidance in at least three opinion letters, that is contrary to the conclusions of the Ninth Circuit in this case. In the Ulissi letter the OSEP stated that

> [E]ach child who is evaluated for a suspected learning disability must be measured against his or her own expected performance, and not against some arbitrary general standard. OSEP letter to Stephen Mark Ulissi, 18 IDELR 683, dated January 14, 1992.

This position was further reinforced by the OSEP in the Lillie letter:

> The interpretation in the letter to Dr. Ulissi is that underachievement is measured against the student's own ability, and not against a normative performance standard. Thus, each child's educational needs are determined on a case-by-case basis, using the evaluation procedures at 34 CFR §§ 300.530-300.534, and the additional criteria at 34 CFR §§ 300.540-300.543 when evaluating children with learning disabilities.

There is no categorical exclusion for children with high IQs in Part B; therefore, if a student with a high I.Q. is not achieving at his expected performance standard for reasons other than those specified in 34 CFR 300.541(b), (the criteria for determining the existence of a specific learning disability (SLD)), and otherwise meets the criteria for that disability in accordance with that provision, the child can properly be identified within the meaning of that disability. Each child who is evaluated for a suspected learning disability must be measured against his own expected performance, and not against some arbitrary general standard. OSEP Letter to Patricia M. Lillie, 23 IDELR 714, May 10, 1994.

In determining a child's current level of educational achievement for purposes of specific learning disability (SLD) identification, it would generally be appropriate to consider information about outside or extra learning support provided to the child when determining whether a child who receives satisfactory grades is nevertheless not achieving age-level. Such information may indicate that a child's current educational achievement reflects the service augmentation, not what the child's achievement would be without such help. OSEP letter to Patricia M. Lillie, *supra*.

In a letter to Juanita Pawlich, OSEP determined:

According to OSEP, a child with a disability is not required to fail in a regular education placement

> before a public agency can implement a more restrictive placement than regular education. However, the following procedures must be followed in determining LRE: the placement team must consider the full range of supplementary aids and services which could be made available to facilitate the student's regular education placement and then determine whether the IEP for the student could be satisfactorily implemented to the regular education environment with the provision of those supplemental aids and services. If it cannot, regular education would not be the LRE for the student. OSEP Letter to Juanita S. Pawlich, 24 IDELR 959, at 962, March 6, 1996.

The Supreme Court has determined that courts should look to the interpretations of the federal regulatory agencies administering federal legislation for guidance in decision making. *See* Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697, 111 S.Ct. 2524, 2534, 115 L.Ed.2d 604 (1991). The OSEP opinions are contrary to the Ninth Circuit's decision that if a child is "performing adequately" (at or above grade level or within the instructional range) in the regular education classroom with modifications, he is not entitled to an IEP under the IDEA.

Is it appropriate for a school district to deny the protection of the IDEA to a gifted child with an attention deficit disorder (a psychological processing disorder), a visual motor

disorder, a medically diagnosed learning disability, and a specific learning disability in the areas of mathematical calculation and written expression until such time as the child is failing the majority of his classes or "performing inadequately"? In this case, after many years of knowing that their child was at least bright, if not gifted in some areas, but also struggling with fairly rudimentary achievements, Parents requested that the OUSD evaluate their child for a learning disability. This was after several years of outside tutoring, psychological counseling, occupational evaluation, private schooling and spending innumerable hours in the evenings helping the child get his homework done, and being informed by OUSD teachers that Allan was not motivated and was performing at the bottom of his class.

Parents requested formal identification and assistance when Allan's fifth grade teacher informed Parents at the first Parent-Teacher conference for that year that Allan was performing below the rest of the class in mathematics and written expression. The Ninth Circuit has said that Cal. Educ. Code § 56337 was applicable and was one of the reasons that Allan didn't qualify for an IEP under the IDEA at that time. Cal. Educ. Code § 56337 states:

> A pupil shall be assessed as having a specific learning disability which makes him or her

eligible for special education and related services when it is determined that all of the following exist:

(a) A severe discrepancy between the intellectual ability and achievements in one or more of the following academic areas:

(1) Oral expression.
(2) Listeni· g comprehension.
(3) Written expression.
(4) Basic reading skills.
(5) Reading comprehension.
(6) Mathematics calculation.
(7) Mathematics reasoning.

(b) The discrepancy is due to a disorder in one or more of the basic psychological processes and is not the result of environmental, cultural, or economic disadvantages.

(c) The discrepancy cannot be corrected through other regular or categorical services offered within the regular instructional program. (emphasis added).

However, when the school district evaluated Allan at the Parents' request, the school district's school psychologist and resource specialist did not find in a written report, as required by the IDEA at 34 C.F.R. §300.543, that Allan had a severe discrepancy between achievement and ability that was correctable without special education and related services with modifications in the regular education classroom (Cal. Educ. Code § 56337) nor that he had an impairment which needed to

be addressed within the classroom (Cal. Educ. Code §56026). The Hearing Officer concluded at a hearing held over a year after the first IEP team meeting and several months after the second IEP team meeting (which was held as part of the mediation process in the administrative proceeding) that any severe discrepancy Allan might have could be corrected within the regular education classroom with modifications. Cal. Educ. Code § 56337(c). The Ninth Circuit agreed with this conclusion. However, as no severe discrepancy was identified by the OUSD or the Hearing Officer, which one of the 7 areas of specific learning disabilities or which impairment were each of the OUSD's modifications correcting? Cal. Educ. Code §§ 56026 and 56337(b). As the modifications were not offered under any formal plan or individualized education plan (IEP), Allan had no procedural or legal protection as demanded by the IDEA nor had he even been properly identified as required by the IDEA. Is it reasonable to expect a school district to voluntarily give appropriate modifications to the regular education classroom to correct a severe discrepancy or impairment when the school district continues to deny at all material times that a severe discrepancy or impairment

existed during the relevant time period?[2] Further, the OUSD has continued to deny that Allan had a learning disability or specific learning disability or that his educational performance was being adversely affected at the relevant time. [Appellee's Answering Brief in the Ninth Circuit Court of Appeals, Appendix, p. C-1.]

The first OUSD IEP team denied Allan an IEP because he was above grade level in academic tests, yet recommended modifications to the regular education classroom and were at the same time stating that Allan was performing adequately within the regular education classroom and that they had not identified a learning disability, impairment, or severe discrepancy. As a result of this seeming paradox, the Parents took their son for further evaluations outside of the school district. One cannot help but be puzzled as to why Allan was

---

[2] The Courts have ruled that the OUSD's treatment of Allan after the HEARING OFFICER's decision was rendered was not admissible in these proceedings. However, the record shows that a different school in the same district the following year determined, after the Parents again requested help for their son, that he would not get any modifications within the regular education classroom. Within several months of that decision, that school determined that Allan was eligible for 504 protection and before that even went into effect determined that he was indeed entitled to the protection of the IDEA. This determination was made because Allan was failing the majority of his core classes. This school found that Allan met all the criteria for a specific learning disability in the areas of mathematical calculation and written expression, all as purported by the Parents and outside professional evaluators for the prior two years.

given informal modifications in the regular education classroom in the first place if his educational performance wasn't being adversely affected? Also, if the modifications were appropriate and effective, why did Allan need special education services because he was failing the majority of his classes within a year of the Hearing Officer's decision?

It was determined by the Hearing Officer that the OUSD had performed an inappropriate assessment. As a result, the Hearing Officer ordered the OUSD to pay for the independent evaluations by Dr. Gary Landman and Shirley Tretten, which were obtained by Parents after the first IEP meeting. The independent evaluations (IEE's) found that Allan had an attention deficit disorder, a specific learning disability and a visual motor disorder and both evaluators recommended services including modifications to the regular education classroom for Allan, as well as special education services. Appendix, H-1 through H-12. These recommendations included, *inter alia*, the use of a word processor in the classroom, counseling for social problems and occupational therapy. However, Allan was never found to be eligible for any of the special education services, let alone many of the other modifications recommended, because the Hearing Officer determined that as long as he could "adequately perform" within the regular education classroom with informal

modifications which did not need to be offered under any formal plan such as an IEP, he was not eligible for the protection of the IDEA or any other federal legislation. The Hearing Officer chose to ignore the special education services recommended in the IEE's, while at the same time finding that the OUSD had to pay for the evaluations because the OUSD had performed an inappropriate assessment.

Throughout these proceedings, the OUSD has maintained its original position that not only was Allan not qualified for the protection of the IDEA as a disabled child, he was, in its opinion, not a disabled child because the OUSD did not believe that he had a learning disability, severe discrepancy, or that he was being adversely affected by ADD[3]. In fact, after stipulating at the Administrative Hearing that Allan had ADD, the OUSD denied in its Answer to the Complaint in District Court that they had made the stipulation. To further that position, the opinion of the one expert witness of OUSD (who had never seen, let alone evaluated Allan) at the District Court was that Allan did not have ADD or a learning disability. Much of the time and money spent in this case was trying to prove, contra to the OUSD position, that Allan had ADD and a specific

[3] It is difficult to understand the OUSD maintaining this position when Allan was found eligible for services because of the ADD and a specific learning disability by another IEP team at a different school within the same district while these proceedings were taking place.

learning disability, and not merely whether those disabilities qualified him for services. The Ninth Circuit has confirmed that Allan did indeed have ADD and a learning disability (and the OUSD has finally agreed in its letter seeking publication of the decision as a precedent).

The Ninth Circuit has found that under California law a disabled child is entitled to the protection of the IDEA only when "their impairment. . . requires instruction, services, or both which cannot be provided with modification of the regular school program." Cal. Educ. Code §56026(b). Appendix, G-1. This California restriction applies to all children with disabilities in the State of California. Again the Ninth Circuit said that Allan was entitled to modifications within the regular education classroom to correct an impairment but not under a formal IEP. Such reasoning totally ignores the mandate of the IDEA. While this may have surficial appeal, it is difficult to believe that school districts will voluntarily address an impairment when they deny the existence of it or its impact on the student. How would they know what modifications are needed when they haven't even formally identified the impairment or severe discrepancy?

How is a disabled child appropriately identified, protected, and assisted in such an informal process? Was it not this very sort of lack of formality and process that the IDEA

was specifically aimed to eliminate? Are the Parents left to depend on a school district to voluntarily implement modifications in the regular education classroom for a disabled child that address an impairment and severe discrepancy without a formal process or plan, when the school district continues to deny that the child has an impairment or severe discrepancy?

One of the services that all professionals who evaluated Allan, including the school district's paraprofessionals, had recommended was that Allan use a word processor as much as possible because of the ADD and learning disability. However, Allan never used a word processor within the regular education classroom during the relevant time period. Instead he began using a word processor at home, which his Parents obtained for him and helped him to learn to use, for the majority of his homework as well as classwork which had to be redone at home to make it acceptable by his teachers. Ironically, the school district then used these typewritten documents (the attorneys for the school district, and consequently the courts, included Allan's typewritten work in describing his "written" work products during these proceedings) to grade Allan's performance and thereby determine that he was "performing adequately" within the regular education classroom.

The IDEA clearly states that the preferred placement for a child with a disability is in the regular education classroom with an individualized education plan (IEP). Under the IDEA, the preferred placement for disabled children is with non-disabled children as this is the preferred placement and is usually considered the least restrictive environment (LRE). 34 C.F.R. §300.550, 20 U.S.C. 1412(5)(B). Any modifications in the LRE are included in an IEP under the IDEA as they are considered supplementary aids and services. 34 C.F.R. § 300.346. Is it appropriate to deny a child eligibility for an IEP in the LRE, the regular education classroom, until that child is not performing adequately or is below grade level or is outside of the instructional range of the rest of the class? Clearly that is not what is contemplated by the IDEA.

The Supreme Court has determined in Rowley v. Board of Education at the Hendrick Hudson Central School District, 102 S.Ct. 3034, 458 U.S. 176, 73 L.Ed.2d 690 (1982), that a school district has met its primary duties in providing a free appropriate public education (FAPE), when it has provided "access" to special education services to a child with a disability. The question in Rowley was not whether a disabled child was eligible for services, but what special education services the child was entitled to once eligibility has been

determined. In fact, the Supreme Court in Rowley makes it very clear that grade level is not the threshold for a FAPE:

> "We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a 'free and appropriate public education.'" Id. at 203, fn 25.

Rowley further finds that a State is required to provide a handicapped child a "free appropriate public education" and that it satisfies this requirement by

> "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP." Id. at 203.

According to Rowley, a state has obligations under the IDEA which are "largely procedural in nature." Id. at 206. Rowley also states that a court's inquiry is twofold:

> "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to

receive educational benefits?" Id. at 206-207.

In this case, the Court has determined that Allan is not entitled to the procedural protection of the IDEA as he is not entitled to an IEP because he is receiving "educational benefit." It is the OUSD's position, which is apparently supported by the Courts, that he is not entitled to the procedural protection of the IDEA until he is "outside of the instructional range of the classroom" or "failing classes." This clearly contradicts the intent of the IDEA and its interpretation in Rowley. Allan was not receiving a free appropriate public education as he had no procedural protection under an IEP and this is a crucial component that is missing in the conclusion of the Ninth Circuit. Allan did not wake up in 7th grade with a disability and consequent eligibility for an IEP under the protection of the IDEA because he was finally failing classes or "performing inadequately."

The Ninth Circuit has stated that in order for Petitioners to have prevailed in this case, Parents had to prove that Allan was not receiving benefit from the regular education classroom with modifications. Not only does this seem to be a totally unfair and undue burden, how do Parents "prove" that their child is not receiving benefit from the regular education classroom with modifications? Does waiting for the child to

fail meet this burden? Obviously, the IDEA recognized that the least restrictive environment, the regular education classroom, is the preferred placement for children with disabilities. However, just because a disabled child is receiving benefit from the regular education classroom with modifications is not an excuse to deny the child protection of the IDEA and special education services when that child is already struggling with a unique, complex situation.

The OUSD has stated in its letter to the Ninth Circuit requesting publication of the Memorandum Decision that the decision in this case should be published because

> "[s]pecial education funding is a scarce resource, and all school districts spend substantial amounts of their general fund moneys meeting the requirements of federal and state law relating to the education of the handicapped, thereby diminishing resources available for the general student population. . . . Court decisions provide an essential voice in the public policy discourse concerning allocation of resources among students of varying abilities." Appendix, p. D-8 through D-9.

This Court has recently determined in Garrett, *infra.*, that while a school district has financial considerations, they also have duties to a disabled child. Cedar Rapids Community School District v. Garret F., ___ U.S. ___, No. 96-1793, Decided

March 3, 1999. Unfortunately, financial concerns appear to be the overriding reasoning for the OUSD's position. Parents of children with disabilities look to the IDEA as providing protection and necessary services for those children, while the school district looks to the IDEA as causing it unreasonable financial burdens.

REASONS FOR GRANTING WRIT

The judgment of the United States Court of Appeals for the Ninth Circuit should be reviewed by this Court because the decision in this case that a disabled child is not qualified for access to special education services or an IEP until such time as he is not "performing adequately" within the regular education classroom with modifications is contrary to the intent of the IDEA and allows the OUSD to delay the early and proper identification of disabled children.

The Hearing Officer subjectively looked to Allan's grade level performance to determine that he wasn't eligible for protection under the IDEA and the Ninth Circuit followed that lead. Looking only to grade level performance is contrary to the intent of the IDEA and its interpretation by the OSEP and case law. The eligibility for an IEP under the IDEA must be based on a disabled child's "unique needs" instead of waiting for the child to fail classes or perform inadequately within the classroom. Not all gifted children have disabilities. Allan is

fairly unique in being gifted, as well as learning disabled. Allan needed an IEP and protection under the IDEA because of his ADD and learning disability.

One must ask why, if schools were meeting the unique needs of children with disabilities in providing a free appropriate public education, was the IDEA even enacted? If grade level performance was intended to be used as the criteria for determining eligibility for services under the IDEA, why doesn't the IDEA simply state that? If the OUSD's criteria are correct, why did the school district not identify Allan's learning disability at an earlier age? For a State to make it more difficult for a child like Allan to be afforded the protection of the IDEA by denying eligibility until such time as he is performing inadequately, below grade level or outside of the instructional range of his class, is not providing him with a free appropriate public education and conflicts with the intent of the IDEA.

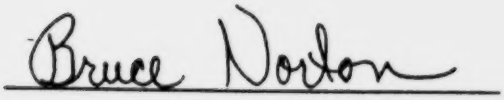
CONCLUSION

For the foregoing reasons, the Petitioners respectfully pray that their Petition for a Writ of Certiorari be granted.

Dated: June 21, 1999.

Respectfully submitted,

[Signature on next page]



Bruce Norton
Attorney Pro Se for Petitioners
4 Ichabod Lane
Orinda, CA 94563
Telephone: 925/254-9009